Supreme Court, U.S.
FILED

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH SCHWARTZ

Respondent,

v.

KAREN A. MURPHY AND
KATHLEEN A. MURPHY

Petitioners.

On Petition for a writ of Certiorari to the Supreme Court of Connecticut

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

May state instrumentalities take airspace above a person's residential shorefront land for the sole express purpose of improving the water view of a single neighboring private landowner?

Since there is no direct right of appeal to the U.S. Supreme Court, how do property owners have a purely private taking that was affirmed by the state's highest court voided pursuant to *Hawaii Housing Auth. V. Midkiff*, 467 U.S. 229, 245 (1984)?

Whether there are limits to a court's authority to misstate or omit material facts, omit material authorities, and issue rulings with no reasoning and, if so, how those limits should be defined and enforced?

PARTIES TO THE PROCEEDINGS

Petitioners, who were defendants below, are Karen A. Murphy and Kathleen A. Murphy.

Respondent, who was the plaintiff below, is Kenneth A. Schwartz.

RULE 29.6 DISCLOSURE STATEMENT

None of the Petitioners is a corporation.

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OPINIONS AND ORDERS ENTERED IN THIS CASE BY THE COURTS

The opinions and orders of the Connecticut state courts of which review is sought are:

(1) The unpublished decision of the Superior Court of Connecticut, Judicial District of Stamford, dated August 30, 2001 and which is reproduced in the Appendix at App.5.

(2) Appellate Court's Order denying Defendants' Motion for Review, filed December 20, 2001, which is reproduced in the Appendix at App. 14.

(3) The decision of the Appellate Court of Connecticut which is reported at *Schwartz v. Murphy et al.*, 74 Conn. App. 286 (2002) and reproduced in the Appendix at App. 15-26.

(4) Superior Court's 3-page Proposed Order dated July 14, 2003, which Order is identical to the one submitted ex parte by Plaintiff's Counsel (App. 106), and which is reproduced in the Appendix at App. 27.

(5) Superior Court's Memorandum of Decision, and Judgment File, both dated October 9, 2003 and which are reproduced in the Appendix at App. 30-38.

(6) Superior Court's "Memorandum Re: Articulation/Termination dated May 27, 2004 which is reproduced in the Appendix at App. 39-42.

(7) Appellate Court Four Orders dated 7/13/04, which, *inter alia*, granted the "portion of the motion [allegedly] requesting dismissal of the appeal as frivolous," and which are reproduced in the Appendix at App. 43-46.

(8) Order from the Appellate Court dated September 13, 2004 granting Defendants' Motion For Reconsideration En Banc dated July 21, 2004 and which is reproduced in the Appendix at App. 47.

(9) Order from the Appellate Court dated October 20, 2004 dismissing the Appeal and which is reproduced in the Appendix at App. 48.

(10) The Order from the Appellate Court dated December 16, 2004 denying Petitioners' Motion for Reconsideration En Banc dated October 28, 2004 and which is reproduced in the Appendix at App. 49.

(11) *Schwartz v. Murphy*, 273 Conn. 912 (2005) decision, dated March 2, 2005, denying Petitioners' Petition for Certification and which is reproduced in the Appendix at App. 50.

JURISDICTION

In a decision released on December 24, 2002 (App. 15), the Connecticut Appellate Court affirmed in part, and reversed in part, the judgment of the trial court.[1] Following remand, the final decision and judgment of the Superior Court of Connecticut, Judicial District of Stamford was entered on October 9, 2003 (App. 30-38). The Appellate Court of Connecticut dismissed Petitioners' Appeal of this final decision and judgment on

[1] Shortly after the Appellate Court released its December 24, 2002 decision, the Defendants filed a Petition for Certification which was denied by the Connecticut Supreme Court on April 3, 2003.

December 16, 2004. (App 49). The Petition for Certification to the Supreme Court of Connecticut filed by the Petitioners was denied on March 2, 2005. (App. 50). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Petitioners contend that the Connecticut courts' decisions rests on an erroneous, factually unsupportable, unconstitutional interpretation of the City of Stamford's Planning Board's letter of June 14, 1978, and, not only involves the knowing and deliberate misrepresentation and omission of the material facts and omission of law on which the case pivots, but also a judicial process where elementary legal principles, rules of evidence, standards of conduct simply ceased to exist. They also claim that the due process and equal protection violations encountered and the judgment sought and secured by Respondent, along with the relief that flows from that ruling, are invalid under the United States Constitution, and conflicts this Court's Fifth and Fourteenth Amendment precedents. Petitioners properly raised these federal claims in the courts below:

- Appendix (Petition for Certification to the Supreme Court of Connecticut) at 257-273;

Schwartz v. Murphy 263 Conn 908 (2003).

- Appendix (Motion for Reconsideration En Banc filed in the Appellate Court on November 1, 2004) at 242-256;
- Appendix (Motion For Review of the Superior Court's "Memorandum Re: Articulation/Termination" dated May 27, 2004, which, inter alia, denied Defendants' Motions for Articulation and Rectification) at 178-184; 186-189;
- Appendix (Defendants' Motion for Review Of Decision To Grant Plaintiff's "Motion To Terminate Stay And For Costs" dated 6/4/04) at 191-192;198-204.
- Appendix (Defendants Appellants' Memorandum of Law Citing Reasons Why The Appeal Should Not Be Dismissed As frivolous) at 225-240;
- Appendix (Motion for Reconsideration En Banc, dated July 21, 2004 and filed in the Connecticut Appellate Court on July 23, 2004) at 207-211; 216-221;
- Appendix (Motion for Disqualification of Judicial Authority) at 162-168;

  Appendix (Defendants' Motion For Review filed December 20, 2001) at 60-68.
- Appendix (Motion to Object to the Proposed Order Contained in the Notice Dated July 14, 2003) at 73-84;
- Appendix (Defendants' Reply To Plaintiff's Response To Defendants' Motion To Object To The Proposed Order Contained In The Notice Dated July 14, 2003) at 102-104;
- Appendix (Motion for Articulation) at 134-140;
- Appendix (Motion for Rectification) at 112 fn 1; 118-127;
- Appendix (Opposition to Motion to Terminate Stay and for Costs, dated 11/18/03) at 150-154;
- Appendix (Reply to Defendant's Opposition to Plaintiff's Motions-11/21/03, where Plaintiff acknowledges outstanding reformation issues) at 172.

Accordingly, the questions to be presented in the petition plainly fall within the jurisdiction of this Court under 28 U.S.C. § 1257(a).

The judgment below is plainly final for purposes of this Court's certiorari jurisdiction. As this Court has long recognized, "Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a '[f]inal judgment or decree.' Title 28 U.S.C. 1257 retains this limitation on our power to review cases coming from state courts." (internal citations omitted) *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Unlike the status of the case following the release of the Appellate Court decision on December 24, 2002, where the trial court was reversed in part, no further proceedings remain to be held in the state courts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "No person shall be… be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. " U.S. CONST. amend. V. (App. 51)

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Pursuant to this Court's Rule 14.1(f), the provisions of Connecticut Rules of Court ("Connecticut Practice Book") involved in this case are reproduced in the Appendix at 52.

STATEMENT

On September 15, 2000, more than 22 years after the City of Stamford Planning Board approved a June 1978 subdivision involving the Defendants' property, the Plaintiff commenced the present action against the Defendants alleging that the Defendants' property, which is located on Plaintiff's southern border, is subject to a view easement in his favor. Plaintiff testified that at the time he acquired his property in 1984 and thereafter, the defendants' predecessors-in-interest did not trim the more than 22 year old hedges or the more than 40 year old tree to what we now know

was a falsely alleged six foot limitation. The extrinsic evidence, (see fn 5 herein) which the trial court first misstated and then excluded from its consideration, shows that the alleged six foot limitation applies to the 1998 subdivision of the property located on the eastern border of Plaintiff's property. The Planning Board's conditions to the 1998 subdivision also state that the six foot limitation does not apply to the existing plantings. (App.89, p. 11)

Notwithstanding the foregoing, the Defendants appealed a Trial Court decision (App. 5) which found that a view easement exists over Defendants' property and granted a mandatory injunction in favor of the Plaintiff. On December 24, 2002, the Appellate Court issued its opinion (App.15), affirming, in part, and reversing, in part, the judgment of the Trial Court.

The Appellate Court ruled that the Trial Court "properly determined that a view easement exists over the defendants' property [which was impose by the City of Stamford's Planning Board letter of June 14, 1978 (App. 21)][2] for the benefit of the

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[2] The record is void of any facts explaining the Planning Board's June 14, 1978 letter (App.100). That letter was part of Plaintiff's Exhibit 16, which was submitted one week after the trial and was different from Plaintiff's Exhibit 16 identified at trial. (App. 64) The Plaintiff had certified the Planning Board file. The individual

plaintiff's [a private party (App. 24, fn 3)] property " (App.17), but that "the court improperly issued a mandatory injunction ordering the defendants to maintain the plaintiff's view easement" (App. 24). The case was "remanded with direction to dissolve the injunction and to determine the respective rights and obligations of the parties with respect to the maintenance of the view easement in accordance with this opinion." (App.24).[3] Upon remand, the

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documents and maps within the file where neither certified nor authenticated. Some of the file documents did not have signatures. Further, any person could access this file without supervision and the Record shows that documents were removed from, and other documents inserted into, the file. Moreover, the Plaintiff called no witnesses other than himself; did no discovery; wrote an eight ¶ complaint (App. 274) which never mentioned the June 14, 1978 letter or the private Dunaway-Contegni Agreement or any right he was claiming under the letter or the Agreement. The Plaintiff subsequently acknowledged, in an *ex parte* communication, that the six foot height limitation allegation in the complaint (i.e., ¶ 5) was false (App. 278). It is undisputed that the Plaintiff has no rights under, and is not subject to the burdens of, the Defendants' deed or the referenced maps. Both the Appellate Court and the Trial Court decisions confirm that Plaintiff's complaint fails to state a claim, and that the Plaintiff did not plead a reformation of the multi-party, Dunaway-Contegni Agreement. (App. 274).

[3] There is no dispute that (i) there is a triangular restriction in the northeast corner of Defendants' property; (ii) the source of that restriction is the Planning Board's letter dated June 14, 1978; (iii) the bushes and the tree in the restricted area were there long before the restriction/easement; (iv) neither the words "easement" nor "view easement" appear in the Defendants' deed, related maps or the Dunaway-Contegni Agreement; and (v) the Plaintiff's rights

Defendants sought, consistent with the mandate (see fn. 16 herein), to have the relevant extrinsic evidence considered by the court. [4]

The Trial Court, however, first misstated the relevant extrinsic evidence and then excluded this material evidence from

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regarding the restriction/easement emanate from ¶ 3 of the Dunaway-Contegni Agreement (App.17), which states: "No dwelling, accessory structure or view obstruction shall be located in the triangular area 50' x 95' x110' at the Southwesterly corner of said premises." (App.286). The terms of the servitude in the Dunaway-Contegni Agreement are not ambiguous. But assuming that they are, if the laws are to be applied equally to all, then the Court must consider the relevant extrinsic evidence (See fn. 5 herein) to solve the ambiguity. The Appellate Court found that one could misread the applicable maps (App.20), but there is no reference to any map in the Dunaway-Contegni Agreement and there are absolutely no misunderstandings in that Agreement regarding the direction of north, south, east or west. (App.285). Further, the Dunaway-Contegni Agreement and the Defendants' deed make references to restrictive covenants, not to any view easement. (App.287). The concessions made to the owners of Plaintiff's property at the time of the subdivision, which did not include a view easement, were clearly noted in the Dunaway-Contegni Agreement. *See* App. 228-234 for additional facts and analysis.

[4] Notwithstanding that the lower court's decision engages in a lengthy analysis of the location of the restriction, the interpretation of defendants' deed and the maps referenced in defendants' deed are not at issue. The Planning Board of the City of Stamford and the Defendants agree, and the extrinsic evidence shows, that at the June 1978 Planning Board meeting a restriction was placed in the northeast corner of the Defendants' property, not the southeast corner. What is at issue is the courts' finding that the restriction/condition the Planning Board of the City of Stamford imposed is a view easement for the sole benefit of the Plaintiff.

its consideration.[5] The Trial Court incredulously interpreted the Appellate Court's mandate to mean: "The only thing that remained for this court [upon remand] was the entry of [a non-appealable] judgment." (App.40).[6] On its face, the Trial Court's Judgment File (App.35) failed to even address the rights of the Defendants, let alone render any determinations. This failure to comply with the Appellate Court's broad mandate is not surprising given that Plaintiff's counsel drafted the Judgment File and then submitted it to the Trial Court in an *ex parte* communication. (See fn. 19

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[5] The extrinsic evidence (App. 87-101), which is explained at App. 74-78, shows that (i) the June 14, 1978 Planning Board letter is the source of the restriction in the northeast corner of Defendants' property; (ii) the Planning Board never required property owners to cut existing plantings at the time when such restrictions were imposed, and (iii) the admitted, falsely alleged six foot height limitation pertains to the property located on the eastern boundary of Plaintiff's property. The Trial Court's misstatement of the foregoing is at App.33. Ironically, the City of Stamford is now requiring the Defendants, for environmental reasons, to plant 33 plants in the northeast corner of their property, the restricted area.

[6] In this Memorandum (App.39), the Trial court further states that "[t]his court denies the defendants' motion for articulation or rectification of its memorandum of decision dated October 9, 2003, because all the issues in this controversy about the view easement were fully litigated and this case is over and finished" (App. 40) and "[t]hey have had their day in court." (App. 42) As depicted in this Petition and shown in the Appendix at 186, several material property rights issues have not been addressed by the Courts and the Defendants have not had a day in court with due process.

herein). The Defendants then claimed on appeal that the Trial Court did not comply with the mandate remand of the Appellate Court. Without a reasoned decision or hearing, the appeal was dismissed as frivolous on October 20, 2004 (App. 48).[7] The Appellate Court's one-sentence Order dated October 20, 2004, which prevents analytical scrutiny against the record evidence, together with the Appellate Court Orders of July 13, 2004, sends a chilling message to all litigants that documented misconduct issues should not be raised on appeal. Petitioners' Motion for Reconsideration En Banc and Petition For Certification to the Supreme Court of Connecticut were denied on December 16, 2004 (App. 49) and March 2, 2005 (App. 50), respectively.

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[7] Prior to the dismissal, the Trial Court and Appellate Court made rulings that were in direct conflict with the Practice Book. *See* App. 206 and 190. In connection with Defendants' prior motions which resulted in the Orders issued on July 13, 2004 (App. 43-46), Paul Hartan, the Deputy Chief Clerk at the Appellate Clerk's office, confirmed that the Honorable Thomas A. Bishop and the Honorable Ian McLachlan were on the panel that issued the Orders on July 13, 2004. Yet, during oral argument in the separate zoning case, Judges Bishop and McLachlan stated that they were not involved in the July 13, 2004 Orders. Moreover, following the Orders of July 13, 2004, Judge Flynn, without explanation, recused himself from the case at bar. (see App.47, 48, 49) Notwithstanding the foregoing, and although requested (App 156) the Trial Judge would not recuse himself from the case.

Listed below are the deed reformation issue questions pertaining to Defendants' property, which the Plaintiff acknowledges,[8] and which were not addressed by the Judgment File and which relate directly to the Appellate Court mandate regarding a determination of rights and obligations in connection with the view easement:

(1) Did the Trial Court's decision eliminate two easements (i.e., one in the southeast corner of Defendants' property, as the Court found in the Planning Board letter of June 14, 1978 (App.100) and Defendants' deed (App.280); and the one the Court found on the southwestern corner of a third party's property, as stated in the unpled Dunaway-Contegni Agreement (App.286))?

(2) Did the Trial Court decision subject the Defendants' property to two easements (i.e., one in the northeast as shown on the applicable maps (App.282), and one in the southeast corner of the property as noted above)?

(3) Are the dimensions of the view easement as shown on the applicable maps (App.282) or as stated in the Dunaway-Contegni Agreement (App.286), and what is the basis for this decision?

(4) Are the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more

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[8] The Plaintiff stated that "[t]hese [reformation] issues ["more precise delineation of the easement area, to reform the deeds in question so that the land records are clarified, to require additional notifications, and to clarify whether or not the hedge can be trimmed below six feet"] will be heard in due time ...." (App. 172).

> than 20 years, to be changed to reflect the Trial Court judge's determination that the "plaintiff has the right to trim the hedge and other bushes located in the easement area to a maximum height of six (6) feet and to trim the elm tree so that it is maintained at approximately the same height as shown in exhibits 12 and 13 ...." (App.37). If so, what is the authority for these reformations. What are the rights of the other parties to the Agreement and are they entitled to notification of the fact that the Agreement has been reformed?

The Trial Court also issued an unclear Judgment File (App.35),[9] which fails to determine the Defendants' rights. In summary, the Defendants contend that the illegal injunction initially imposed by the Trial Court was more favorable to their rights than the Judgment File, which was written by Plaintiff's

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[9] The Judgment File states that "[t]he plaintiff has the right to trim the hedge and other bushes ... to a maximum height of six (6) feet," which means the Plaintiff can trim the hedge and bushes to less than an inch, effectively removing them. (App. 37). The Appellate Court implied that, if the facts and law support it, "if the hedge and other bushes ... are kept at a height of six feet ..., there is no impingement on the plaintiff's view ...." (App.26, at fn 8). (emphasis added). This is a materially different instruction to the Trial Court than it adopted. Note that plaintiff acknowledges this discrepancy as well. *See* fn 8 herein. The Judgment File further provides that the Plaintiff can enter Defendants' property "only at reasonable times and not on weekends." (App.38). Thus, if the Defendants were hosting an event, a holiday gathering, a party, or a fund-raiser during a weekday, they would not be entitled to notice under the terms of the Judgment File and trimming and pruning would be permitted.

counsel in an *ex parte* communication.

A. The Defendants' rights under the United States Constitution were violated when the Connecticut lower courts found that the Stamford Planning Board, a government agency, took the Defendants' private property and gave it to another private party for such party's personal use.

The record shows, and the extrinsic evidence confirms, that the City of Stamford did not create the restriction on Defendants' property for the benefit of the Plaintiff, another private party.[10] The courts below, however, improperly concluded that the City imposed a view easement on Defendants' property. Even if the City did impose the easement, which it did not, it would be an unconstitutional taking of Defendants' property because, as the Court found, any public benefit from the taking would not only be secondary to the private benefit, but "difficult to discern the identity of any other beneficiary." (App.24 at fn 3)."[11]

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[10] *See* fn 5 herein.

[11] The Appellate Court (i) found that "in granting that subdivision application, the planning board, inter alia, imposed a condition that a triangular area in the [northeast] corner of what is presently the defendants' property be subject to a view easement." (App.21); and then (ii) favorably cited the Trial Court's observation that "if the view easement is not for the benefit of the plaintiff's property [a private party], it is difficult to discern the identity of any other

There is no case in which a governmental agency, including the judicial branch, took or transferred private property from one private party owner to another, that has ever been held to be a constitutional exercise of government power in any state of the union. Yet, as the record here shows, that is exactly what has happened in this case. If the lower courts' ruling stands, the private property of the Defendants, in the form of a view easement, will have been transferred to the Plaintiff, another private party.[12]

Finally, even if it is held that, under the facts of this case, a governmental agency can take private property from one private party and transfer it to another, the relevant extrinsic evidence shows that the tree and/or the hedges would not have to be cut or trimmed in the maintenance of the easement. See fn 5 herein. Further, it would be discriminatory for the Planning Board to require the Defendants to cut or remove their existing plantings when such demands are not made of similar situated property owners (see Extrinsic evidence, in particular, paragraph 11 for Conditions of Subdivision Appl. No. 3707 at App. 89). *Village of*

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beneficiary." (App. 24 at fn 3).

[12] *See Kelo v. City of New London*, 268 Conn. 1, 843 A.2d 500

Willowbrook v. Olech, 528 U.S. 562 (2000).

Petitioners also seek review by this Court of the constitutional equal protection and due process violations encountered by the Defendants in this case.

B. The Connecticut Court decisions violated the Defendants' rights to equal protection of the laws and due process under the United States Constitution.

The Defendants were denied equal protection under the laws. Specifically, the lower courts (i) effected a *de facto* reformation of Defendants' deed, not in accordance with the law for deed reformations,[13] but by use of footnotes and theories of "typographical" and "scrivener's" errors with not a scintilla of

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(2004).

[13] A deed reformation must be specifically pled or it will not be adjudicated. *Homeowners Loan Corporation v. Nasaitko*, 129 Conn. 19 (1942) and *Harris v. Clinton*, 138 Conn. 657 (1952). Plaintiff failed to plead a deed reformation.(App.274) The standard of proof for a deed reformation is considerable. It requires evidence that is "clear, substantial and convincing." *Lopinto v. Haines*, 185 Conn. 527 (1981). Further, a reformation will only be effected where the document itself is ambiguous. *F. & AK, Inc. v. Sleeper*, 161 Conn. 505 (1971). There is no ambiguity within the Dunaway-Contegni agreement and the Courts below found no ambiguity in the Dunaway-Contegni agreement. Even if the plaintiff had properly plead an action in deed reformation, the evidence does not support such action. The Dunaway-Contegni agreement is clear, consistent and unambiguous.

testimonial evidence, no notice or opportunity for the Defendants and other third parties to be heard on this deed reformation, and with unauthenticated and unexplained documents;[14] (ii) ignored the well settled Connecticut case law which recognizes that the reversal of an order of the Superior Court renders that order completely void, and puts the parties back in the positions they occupied before the original action was brought;[15] (iii) failed to follow the remand order and the law by excluding the relevant extrinsic evidence from consideration;[16] (iv) disregarded the law that a judgment establishing the terms of the servitude should be so precise and definite in its terms that the parties may clearly understand what acts are to be done by them on the one side and

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[14] *See* fn 2 herein.

[15] *See* Judge Lavery's summary of the general rule regarding reversals in his dissent in *Mulholland v. Mulholland*, 31 Conn. App. 214, 624 A.2d 379 (1993).

[16] In its opinion, the Appellate Court clearly noted and the law states that "[i]f the meaning of the language contained in a deed or conveyance is not clear [e.g., the terms of the Planning Board letter referenced in Defendants' deed], the trial court is bound to consider any relevant extrinsic evidence presented by the parties ...." (App.18). (emphasis added). *Mulla v. Maguire*, 65 Conn. App. 525, 531-32, cert. denied, 258 Conn. 934 (2001)

the other, and how their rights are determined;[17] (v) did not follow the Connecticut Supreme Court's holdings in *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 464 n.7, 538 A.2d 1017 (1988), because the issues raised by Defendants on appeal (e.g., the inappropriate reformation of Defendants' deed, applicable map notations, and the private Dunaway-Contegni Agreement; misapprehension of the facts; and judicial and attorney misconduct) do not fall within the definition of frivolous as set forth in *Texaco*;[18] and (vi) overlooked all of the law and the facts regarding judicial and counsel misconduct.[19]

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[17] *See Goldberg v. Krayeske*, 102 Conn. 137, 144, 128 A.27 (1925).

[18] The dismissal also conflicts with the Appellate Court's holdings in *Connecticut National Bank v. Zuckerman*, 1 Conn. App. 440, 441-42 (1993) (where the appellant filed an appeal challenging the trial court's refusal to act beyond the scope of the remand order). Here, the Defendants filed the appeal because the Trial Court did not comply with the remand order.

[19] For example, an ex *parte* communication raises a rebuttable presumption of prejudice. Once the Defendants show an improper *ex parte* communication has occurred, the burden of showing that the communication was harmless shifts to the party seeking to uphold the validity of the decision. *Daniel v. Zoning Commission of the City of Norwalk*, 35 Conn. App. 594,645 A.2d 1022. The Defendants were harmed by the *ex parte* communication, wherein the Plaintiff's counsel drafted a Judgment File (See App.102-104; 163-165; 105-109; Compare App.27-29 to App.106-107; 33-34), which completely ignored the Defendants' rights in connection

The Defendants were also denied due process.[20] At nearly every stage in the case, the Defendants were denied the opportunity to contest the basis upon which the lower courts sought to deprive them of their property rights.[21] Further, the lower courts took Defendants' property without appropriate justification. For example, the Connecticut Courts (i) without any evidence in the record,[22] interpreted numbered ¶ 2 of the Planning Board's June 14, 1978 letter as creating a view easement for the Plaintiff, a private party; (ii) by dismissing the appeal, sanctioned the Trial

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with the restriction/easement. *See* App.35; and by the admission of Plaintiff's Exhibit 16. *See* fn 2; also see Plaintiff's Reply, filed without permission, to Defendants' Reply. (App.277)

[20] "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases." *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). Procedural due process rules are intended to protect people from the mistaken or unjustified deprivation of life, liberty, or property, not from the deprivation. The rules are meant to minimize substantively unfair or erroneous deprivations by enabling individuals to contest the basis upon which a state/governmental agency proposes to deprive them of protected interests. Substantive due process guarantees not only that appropriate and just procedures be used whenever the government is taking away a person's life, freedom or property, but also guarantees that a person's life, freedom and property cannot be taken without appropriate governmental justification, regardless of the taking procedures used.

[21] Excluded from evidence Defendants' relevant and material extrinsic evidence-see fn 5 herein; see also fn 26 herein.

Court's misstatement of the relevant extrinsic evidence, and the preclusion of same from consideration;[23] (iii) circumvented the law for deed reformations by using typographical and scrivener's error theories (App. 25 at fn 6)[24]; (iv) permitted the Plaintiff to recover under a cause of action not pled;[25] (v) effectively denied all of Defendants' Motions for Articulation, Rectification and Review;[26] (vi) in a one-sentence Summary Order without opinion (App. 48), summarily dismissed the Defendants' direct appeal as frivolous without conducting a hearing under PB § 85-1;[27] and (vii)

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[22] *See* fn 2 herein.

[23] *See* fn 5 herein.

[24] Even if one accepts the scrivener's error theory for the location of the restriction, no reasonable court would accept such a theory to rewrite the notations on the relevant maps and the Dunaway-Contegni Agreement, in place for more than 20 years, to conform to the Trial Court's Judgment File, which effectively has been done in the case at bar, although that is even unclear. See fn 2 at App. 12 for the basis for trimming the tree.

[25] Plaintiff's complaint (App.274) has not been amended to add the unpled Dunaway-Contegni Agreement, which all parties agreed must be done. App. 60-61. Also *see* fn 3.

[26] *See* App. 39-42; 43-46; 47. By denying the Motion of the Defendants', filed December 20, 2001, for review of photoduplicated record (App.14), the Appellate Court was able to dismiss Defendants' claims as not supported by the record. (App. 24 at fn 1). *See* PB § 68-3-note record versus case file, and App.55.

[27] The Defendants were never granted a hearing, as required by PB

sanctioned *ex parte* communications (See fn 19 herein). In summary, the Connecticut courts below have committed such substantive and procedural violations of the law and have so far departed from the accepted and usual course of judicial proceedings in this case, as to call not only for a reversal of the decision and judgment for the defendants but also to question whether the judicial and attorney conduct in this case comports with that required for this Court to justifiably rely on Connecticut's state courts to fulfill its constitutional role as primary guarantors of federal constitutional rights?

In conclusion, the Defendants request that this Petition For Certification be granted for the reasons set forth below and on the basis of the facts and legal issues stated above.

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§ 85-3, before the imposition of the ultimate sanction. Instead, the Appellate Court listed the appeal on its own motion calendar (App. 47) "as to whether or not the appeal should be dismissed as frivolous," pursuant to PB § 60-2, which action denied Defendants a hearing (other than 5 minutes of oral argument on the motion) and shifted the burden of proof to the Defendants. In *Texaco, supra*, this Court held that "the burden of proof lies on the moving party to establish the frivolity of the appeal." Except for conclusory allegations, the Plaintiff has not offered a scintilla of evidence, cited any case or provided any legal analysis to show that the appeal is frivolous, nor did he rebut any of the law or facts cited in Defendants' Memorandum Of Law (App.223).

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES A SUBSTANTIAL FEDERAL QUESTION ON AN ISSUE OF SIGNIFICANCE, THAT IS, WHETHER THERE ARE LIMITS TO THE GOVERNMENT'S AUTHORITY TO TAKE PRIVATE PROPERTY FOR PRIVATE USE, AND, IF SO, HOW THOSE LIMITS SHOULD BE DEFINED AND ENFORCED.

This is not a case that concerns the use of the taking clause for a traditional public use such as a road or public building or for the purpose of urban renewal/blight removal such as the condemnations upheld in *Berman v. Parker*, 348 U.S. 26 (1954), and its progeny; nor does it concern the use of the taking clause to help a government increase its tax revenue and to create jobs currently under review by this Court in *Kelo v. City of New London*. It also is not a regulatory taking case where, after all, the laws and regulations are the product of majority voting in a democratic system. Rather, this case involves a taking with no public use or purpose a situation that at least some Justices of this Court implied during oral argument in *Kelo v.City of London* could never happen.[28] The constitutional question presented is whether:

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[28] During oral argument in the *Kelo v. City of New London* Justice Breyer said he could not imagine any taking that would not have a

state instrumentalities may take airspace above a person's residential shorefront land for the sole express purpose of improving the water view of a single neighboring private landowner. This is the broadest expansion of the taking clause yet realized. The case shows why there must be limits/guidelines within the broad taking powers of government. Without limits, lower courts will conduct limited, if any, constitutional analysis of the taking of property by state instrumentalities.

In *Schwartz v. Murphy*, the Connecticut Appellate Court, as affirmed by the Supreme Court of Connecticut, (i) found as fact that "in granting that subdivision application, the [City of Stamford] planning board, inter alia, imposed a condition that a triangular area in the [northeast] corner of what is presently the

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public benefit, so why does there have to be a limit within the broad eminent domain powers of government? At oral argument Justice Bryer specifically said:

> "..there is no taking for private use that you could imagine in reality that wouldn't also have a public benefit of some kind, whether it's increasing jobs or increasing taxes, et cetera. That's a fact of the world. And so given that fact of the world, that is law, why shouldn't the law say, okay, virtually every taking is all right, as long as there is some public benefit which there always is..." (emphasis added)

defendants' property be subject to a view easement." (App. 21); and (ii) agreed with and favorably cited the Trial Court's observation that "if the view easement is not for the benefit of the plaintiff's property [a private party], it is difficult to discern the identity of any other beneficiary."(App.24, fn 3).[29]

Even if the City of Stamford did impose the easement, which the Murphys contend it did not, and the approval of the subdivision was deemed adequate compensation paid, it would still be an unconstitutional taking of defendants' property because the taking was without a justifying public purpose. As the lower courts found, "it is difficult to discern the identity of any other beneficiary [of the easement other than the plaintiff, a private party]." (see fn 3 of Opinion at App. 24).

The need for this Court to specify limits/guidelines for the taking clause is demonstrated in this case. If the court below did

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[29] The Trial Court stated; "In granting this subdivision application, the Planning Board imposed a condition that a triangular area in the corner of what is now the defendants' property was subject to a view easement."(App.8) Note further that in the trial court's decision the word northeast does not even appear.(App.5). And there is absolutely no effort to make any distinction among conditions, restrictions and view easements.

not make the expressed finding that the only discernable beneficiary of the easement was the plaintiff, a private party, the Defendants would have an undue burden to demonstrate the unconstitutional taking of their property. After all, a number of courts, including the court below, have concluded that *Midkiff* dictates that, absent overwhelming evidence of bad faith or official corruption, all uses of taking must be affirmed. Justice Bryer's position (and to some extent the opinion held by the other Justices), expressed during oral argument in *Kelo v. City of New London*, is that "every taking is all right, as long as there is some public benefit which there always is..." As the case at bar demonstrates, the Connecticut courts do not even perform a constitutional analysis before affirming the taking of private property by a state instrumentality. Meaningful checks on the abuses of the taking clause and to provide guidance to government officials, property owners, and courts in reviewing the taking of private property for private use are needed.

II. THIS CASE PRESENTS THE COURT WITH A UNIQUE OPPORTUNITY TO EXAMINE ANOTHER FEDERAL CONSTITUTIONAL ISSUE OF IMPORTANCE: IF A STATE'S HIGHEST COURT AFFIRMS A PURELY PRIVATE TAKING, HOW IS THE TAKING VOIDED?

With the passage of the Fourteenth Amendment, the United States extended a baseline of protection of individuals' rights throughout the country. In *Hawaii Housing Auth. V. Midkiff*, 467 U.S. 229, 245 (1984) the this Court held that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." The Connecticut lower courts acknowledged that the taking in the instant case benefits no one except the plaintiff, a private party. Therefore, given that the defendants have no direct right of direct appeal to this Court, and the highest state court, the Supreme Court of Connecticut, affirmed the purely private taking, how do the Defendants have the purely private taking voided under *Midkiff?* Or is this a right with no remedy?

Our country has made great progress over the past years in guaranteeing civil rights, but we have failed to make the connection between civil rights and property rights. The former can only exist if the latter are secure. As this Court declared in *Lynch v. Household Finance Corp.* 405 U.S. 538 (1972): "Property does not have rights. People have rights. . . . In fact, a fundamental

interdependence exists between the personal right to liberty, and the personal right in property. Neither could have meaning without the other." John Adams said that "the moment that idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property must be sacred or liberty cannot exist." If only out of the concern for the plight of the defendants in the case at bar certiorari should be granted.

III. THIS CASE PRESENTS THE COURT WITH A RARE OPPORTUNITY TO DIRECTLY ADDRESS A CONSTITUTIONAL ISSUE OF SIGNIFICANCE, THAT IS: WHEN IS U.S. SUPREME COURT NO LONGER JUSTIFIED IN RELYING PRIMARILY ON A STATE'S STATE COURTS TO FULFILL ITS CONSTITUTIONAL ROLE AS PRIMARY GUARANTORS OF FEDERAL CONSTITUTIONAL RIGHTS?

Our judicial system depends on "good faith" decision-making. It was never intended to include intellectually dishonest decisions or "bad-faith" decision –making, where a judge knowingly and deliberating disregards the facts and law of the case. This case is not about innocent misstatement of facts, nor about peripheral facts. It not only involves the knowing and deliberate misrepresentation or omission of the material facts and

omission of law on which the case pivots, but also a judicial process where elementary legal principles, rules of evidence, standards of conduct simply ceased to exist.

The prevalence of intellectually dishonest decisions is described by Northwestern Law Professor Anthony D'Amato in "The Ultimate Injustice: When the Court Misstates the Facts" *Cardozo Law Review*, Vol. 11: 1313 (1990). He shows how judges at different levels of the state and federal systems manipulate the facts and the law to make a case turn out the way they want it to. It quotes from a speech by Hofstra Law Professor Monroe Freedman to The Seventh Annual Judicial Conference of the US Court of Appeals for the Federal Circuit (May 24, 1989), reprinted in 128 F.R.D. 409, 439 (1989):

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.

According to Professor Freedman immediately after his speech, a judge sitting next to him said, "You don't know the half of it."

Our nation is founded upon the ideals of individual rights, liberty and justice as reflected in the Constitution and the Declaration of Independence. The federal judiciary, in particular this Court, has then primary duty to safeguard these ideals. Yet blatant injustice and abuse of fundamental rights are all around us today, and the blame for its belongs squarely with the judiciary. Shock and disbelief is how novice litigants, including the Defendants, receive the reality of adjudication in our court system. The decent image of judges they once had gives way to one of dishonest, heartless careerists, who feign respect for the law in the few cases adjudicated in public view, yet walk all over litigants' rights in many cases that are handled backstage.[30]

This case presents the issue with a fully-developed record and legal decisions and is not muddied by procedural difficulties that could frustrate review.[31] Further, to no avail, the Defendants

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[30] A lawyer's ethical duty is to zealously represent each client, yet lawyers seldom raise misconduct issues. Lawyers have other clients whose cases may come before that judge. And it is not just their relationship with that judge that they want to protect, but with his judicial brethren, who are part of the judge's circle of friends and may be quite defensive of his honor, which they see as an extension of their own.

[31] If the omitted undisputed material facts and law set forth above,

tried to file a formal complaint with the Connecticut General Assembly regarding the unconstitutional conduct of the Connecticut Supreme Court and Appellate Court in this matter. [32]

The legal issue could not be more clearly presented to this Court: Whether there are limits to a court's authority to misstate or omit the material facts, omit material authorities, and issue rulings with no reasoning and, if so, how those limits should be defined and enforced?

CONCLUSION

For all the foregoing reasons, Petitioners respectfully ask this honorable Court to grant the petition.

Respectfully submitted this 27th day of May, 2005.

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Petitioners

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and at App.175-189, were clearly set forth and analyzed in the Trial Courts Memorandum (App.39), in all likelihood the opinion would be substantially different, and there would be no need for this Petition for Certification or the prior appeals.

[32] Each member of the Judiciary Committee received a copy of the e-mail reproduced in the Appendix at 288.